



REPUBLIC OF KENYA

High Court at Kisumu

Election Petition 2 of 2012

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT,
2012**

AND

IN THE MATTER OF THE ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS 2012

AND

**IN THE MATTER OF THE ELECTIONS(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION
RULES, 2013**

AND

IN THE MATTER OF THE ELECTION FOR GOVERNOR OF SIAYA COUNTY

WILLIAM ODHIAMBO ODUOL

.....**PETITIONER**

VERSUS

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST
RESPONDENT**

**BENSON MUGATSIA.....2ND
RESPONDENT**

**CORNEL RASANGA AMOTH3RD
RESPONDENT**

R U L I N G

Section 106A of the Evidence Act (Cap 80) provides that the contents of electronic records may be proved in accordance with the provisions of section 106B. Section 106B deals with the admissibility of electronic records in the following terms:

“106B (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

The conditions to be satisfied are provided in sub-section (2) as follows:

a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out

over that period by a person having lawful control over the use of the computer;

- b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- c) throughout the material part of the said period the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
- d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

Under sub-section (4), where a party seeks to give evidence by virtue of section 106B he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

- a) identify the electronic record containing the statement and describing the manner in which it was produced; and
- b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer.

The certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate).

In the case of *REPUBLIC .V. BARISA WAYU MATUGUDA* [2011] eKLR the court observed that:

“.....any information stored in a computer.....which is then printed or copied....shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.

The court went on that:

“This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B(4). Such certificate must in terms of S.106B(4)(d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence.”

In the joint written submissions by the respondents counsel they sought to draw a distinction between the ordinary documentary evidence and electronic evidence. They also indicated why the Evidence Act has put conditions on the admissibility of electronic evidence. This is what they said:

“But electronic evidence presents unique characteristics which necessitate careful treatment. First, while alterations on physical document are often immediately visible on its face, this is not the case with electronic material. An electronic document can be, and is often, modified in the process of collecting it as evidence. A common example occurs when a file or application is opened, or copied from one computer into another or into an external hard drive. Changes which are not often immediately visible occur. Second, compared with physical or other forms of exhibit evidence electronic

evidence is relatively more difficult to detect and trace the signs of tampering. It can be changed or manipulated much more easily than paper or other forms of evidence without having any obvious trace of such alteration.

Third, computer equipment runs on an artificial intelligence which receives, interpreters and applies human commands. This artificial intelligence has been known to go awry. System crashes, viruses, and/or botnets often occur, compromising the integrity of the material captured, preserved or presented using a computer. Finally, the capturing, preserving and presenting of evidence in electronic form requires a measure of technical knowledge in the operation of the electronic equipment.”

I fully agree with counsel on the need to be careful when admitting electronic evidence.

In the instant case, objection was taken by the respondents to the desire by AUGUSTINE OGAE ADHOLA (PW7), called by the petitioner, to produce a CD as part of his evidence. He was the petitioner's chief campaign manager for Rarieda Constituency and testified that on 4/3/13 his agent for Ujwan'ga polling station called to say that he had caught an IEBC clerk who was just about to stuff marked ballot papers into ballot boxes. PW7 rushed to the scene and, in the presence of the IEBC coordinator, OCS of the area and the clerk, used his Nokia E7 cellphone to take video of the ballot papers which he found in the hands of the agent. After the elections he went to Nairobi and developed the video into CD. The CD was part of the exhibits he annexed to the affidavit he swore in support of the petition. He swore two affidavits on 8/4/13. One was witness affidavit and the other was “Affidavit Verifying Video Recording.”

Mr. P.J. Otieno, holding brief for Mr. Gumbo for the 1st and 2nd respondents, and Mr. Kopot for the 3rd respondent objected to the production of the CD on the following grounds:

- a) that the particulars of the device used by the witness to develop the CD had not been disclosed as required by Section 106B;
- b) that no certificate accompanying the CD had been produced; and
- c) that the petitioner had not discharged the burden imposed on him by section 107 of the Evidence Act.

The response by Mr. Wakla Odhiambo for the petitioner was that the device used to capture the information was PW7's telephone handset which had a video recording facility; and that PW7 was the owner of the handset which he had control of. Regarding the certificate, his contention was that the affidavit verifying video recording should be taken to be the certificate.

The relevant portions of PW'7's verifying affidavit were as follows:

“8. THAT I also took video clips of the said marked ballot papers using my cell phone make Nokia E7 which has video recording facilities.

9. THAT the video recording shows images of marked ballot papers as aforesaid and also contains my voice while I was talking to the DCIO, Bondo Police station informing him of the said electoral offence.

10. THAT the said video also captures, images of the Petitioner's agent called ZACKARY ODERO who is the person holding the ballot papers in the video.

11. THAT I later downloaded the said video clip into CD format and played it back where I was able to ascertain that the recordings were a true and accurate record of the happenings of the said events of 4th March 2013 at Ujwang'a polling station aforesaid."

Coming back to section 106B(4), even if it were to be taken that the verifying affidavit is a certificate, the petitioner has to show that it meets the conditions in subsection (2) and in (a) and (b) of subsection (4). From the evidence of PW7 it does appear that the video was first recorded and saved in internal memory of the phone. The phone must then have been connected to a computer using a micro USB data cable; the video file was accessed from a computer through the cable, the file was copied to the computer's hard disk; an empty CD was inserted into the computer's CD-writer RAM; and the video file was then written on the CD as a VCD using a CD writing software.

PW7 may be the owner of the phone handset, but said nothing about its working condition. There was no evidence regarding the computer used, its condition or reliability. There was no evidence to show that PW7 was the one who owned, operated and managed the computer. The particulars of the computer were not given. My considered view is that the verifying affidavit is not certificate in terms of subsection (4), and neither has PW7 satisfied the conditions of subsection (2).

In the case of *R. V. ROBSON AND HARRIS* [1972] 1 W.L.R. 651 the court was dealing with the admissibility of tape recording of alleged conversations between the defendants and prosecution witness. It was held that in considering the question of admissibility the court was required to satisfy itself that what the prosecution alleged to be original tapes were shown, *prima facie*, to be original by evidence which defined and described the provenance and the history of the recording upto the moment of production in court. I find that PW7 has not given this history. It cannot be ascertained that the computers used in the production of this CD were operating properly and therefore that its content is accurate.

The reason why the particulars of the computers used in the production of the CD had to be given (and such particulars would include the make and the serial numbers) is so that, if it becomes necessary, one can trace the devices for audit purposes.

In conclusion, I find that the CD sought to be produced is not admissible.

Dated, signed and delivered this 5th day of June 2013.

A. O. MUCHELULE

J U D G E



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